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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1219

WILLIAM R. HILL, JR.,
PETITIONER,

v.

SPERRY RAND CORPORATION,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Questions Presented

The respondent rejects and disavows the "Questions Presented" in the petition (P. 2-4). The very manner of their statement is an attack on the intellectual integrity of the judges of the Court of Appeals. Respondent submits the following questions:

1. Was the respondent-defendant entitled to a directed verdict on the petitioner's claim for damages under the New York Civil Rights Law?

2. Was the respondent entitled to a directed verdict on the claim for punitive damages, based on respondent's alleged malice, under the New York common law?

3. Is the respondent entitled to a new trial on the issue of compensatory damages because the jury verdict included damages under the New York statute?

4. Did the Court of Appeals abuse its discretion in awarding costs to the respondent?

5. Should the trial court have applied New York common or statutory law in presenting the case to the jury?

6. Did the trial judge commit reversible error in the course of the trial by:

   a. Admitting incompetent evidence; and
   b. Excluding admissible evidence?

7. Was the trial judge's charge to the jury fair to the respondent or did it contain errors of omission or commission?

Counter Statement of the Case

Most of the facts set forth in the petitioner's Statement of the Case are not "material to the consideration of the questions presented" in the petition. The statement also contains much that is argumentative rather than factual. The respondent, for purposes of brevity, specifies only the following portions of the statement to which it objects. (Page references are to the petition unless the prefix "R" appears).

1. The first full paragraph on page 9 states that respondent appointed Murphy its "exclusive agent". The record citation (R. 918) clearly limits this agency to the placing of newspaper and magazine stories. It was not a broad agency with respect to the entire project as the petitioner seems to imply.

2. The first full paragraph on page 13 states that the article was "adopted by respondent as an advertising and promotion scheme" after its conception by Murphy. The Court of Appeals (A-8 and 13) ruled specifically that the respondent was not charged with any knowledge that Murphy may have possessed.

3. The first full paragraph of page 15 intimates that the petitioner lost referral work and that he was demoted as a result of the publication of the article. This part of the statement, in itself not material, fails completely to mention that:

a. The petitioner stipulated that he suffered no loss of income (R. 850), or that

b. The trial judge instructed the jury that it could not award damages for petitioner's failure of reappointment (R. 838).

4. The last paragraph on page 15, stating that "They all knew", referring to the respondent and its agents, is totally inaccurate and misleading. It cites the opinion of the trial judge as authority (R. 876) but does not mention the ruling of the Court of Appeals. There simply was no evidence of knowledge on the part of any officer, agent, or employee of the respondent which was imputable to it!

5. Dr. Finnerty never informed the respondent that Dr. Hill was not a co-author of the article. His letters, referred to at the bottom of page 16, had nothing to do with this aspect of the case.

6. It is unbelievable that petitioner is serious in stating *as a fact* that his silence during the crucial period of the advertising campaign "did not prejudice the respondent in any way". (lines 7-8 of page 17). It is completely inaccurate to state that the respondent "continued to distribute and solicit requests for reprints" after notice from the petitioner.

In support of these latter statements, the petition quotes at length from the testimony *on deposition* of one Landseidel taken in New York, months in advance of trial. (R. 621-628). It is clear that, in the informality of the questioning, counsel for respondent and the witness were talking at cross purposes. For example, counsel inquired about an attack on the "authenticity" of the report. He did not use the proper word "authorship". The witness replied that the attack was "very early in the advertising campaign." (R. 626-627). He could not have been referring to the denial of authorsnip by Dr. Hill which came near the end of the campaign. Counsel for the petitioner consistently employed the pronoun "you". Landseidel, obviously, interpreted this as referring to him *personally* rather than to the respondent corporation. Either he replied with a cryptic "No" or he employed the pronoun "I".

The statement fails to mention the uncontroverted testimony of petitioner's own witness, Clarke, an employee of the respondent, who testified on seven different days at the trial (R. 203-630). The Court of Appeals was adverting to Clarke's testimony when it stated that the evidence was uncontradicted that the respondent was "unaware that plaintiff had not written the article or consented to his name being attached to it" and that, upon receiving notice to the contrary, respondent "took immediate steps to discontinue distribution of the article" (A-12).

Argument

I. There Is No Sound Reason For the Court to Exercise Its Discretion to Grant A Writ of Certiorari.

This case should not commend itself to the court. It does not fall within any of the guides set forth in Rule 19. No federal question or conflict of decisions is involved. There is a strained attempt by the petitioner to invoke the Fifth and Seventh Amendments. In effect, he argues that any and every directed verdict constitutes a denial of the right to a trial by jury. And, that the discretionary award of actual costs is a denial of due process.

This is not a case where the Court of Appeals has substituted its own findings of fact for those of the jury. It has simply and correctly ruled that certain extraordinary questions of law should not have been submitted to the fact finder. The Circuit Court has upheld the jury's finding that the petitioner was libeled by the respondent. However, it has ruled, as a matter of law, that there was not enough evidence to warrant a finding of malice. It ruled further that the petitioner's own, uncontradicted evidence described a course of conduct which barred him from the recovery of damages under the New York statute.

The situation is analogous to one in which a court rules that there is insufficient evidence to support a finding of gross negligence while permitting the jury to consider the question of ordinary negligence.

The petitioner seems to ask for relief from this Court on the ground that the Circuit Court has drastically departed from "the accepted and usual course of judicial proceedings." At the least, the language of the petition is intemperate. In fact, its language borders on the scandalous and, if contained in a brief, might well be stricken

pursuant to Rule 40(5) of this Court. It asserts that the Court of Appeals, among other things:

(1) Distorted evidence and misstated undisputed facts (2, par. 1(c) and 22),

(2) Determined the result of the case and then shaped the record to support the same (3, par. 1(d)),

(3) Deliberately avoided the legitimate issues of the case (g), and

(4) Cynically and deliberately rendered a wrong opinion on the assumption that the odds were against it being reviewed by this Court (30).

To argue that a court has erred as a matter of law is the recognized duty of counsel for an appellant. However, impugning the motives and integrity of a court cannot be sanctioned. The Court of Appeals for the First Circuit, with a distinguished guest judge sitting by designation, needs no defense from such charges. However, counsel for the respondent would be remiss in their duties as officers of any court, if they did not voice their disagreement with and disapproval of the statements described above.

II. The Decision Below Is Correct.

The Court of Appeals chose to base its decision on two principal grounds, to wit:

1. That the petitioner could not recover under the New York statute because of his own admitted inaction during a crucial period, and

2. That respondent was not charged with the knowledge or unauthorized conduct of its agent, Murphy.

In attacking these, the petitioner has dragged in a hodge podge of immaterial evidence having no relation to the issues involved. We cite only a few instances as examples:

(a) The long recitation of Dr. Hill's qualifications and background (6-7).

(b) The fact that the article was rejected before acceptance by G P Magazine (9-10).

(c) The references to the cancer incident and the activities of Dr. Finnerty (10, 11, 12).

(d) The quality of the article and its effect on the petitioner's reputation (14-15).

These inclusions serve only to obscure the undisputed, really pertinent evidence relied on by the court below. The article was published in March, 1961 and the petitioner learned of it shortly thereafter. He obtained reprints of the article in March or April and *immediately retained counsel* (R. 43-44). The first advertisement was not published until May, 1961. Dr. Hill did not disavow authorship to G P until October and did not notify the respondent until November 6, 1961. (R. 527). This was the first intimation that the respondent had that the petitioner might not be a co-author of the article. (R. 527). Upon receipt of this notice, Clarke took immediate steps to halt the distribution of reprints bearing the petitioner's name. (R. 528-529).

There was no evidence of actual knowledge, malice or recklessness on the part of the respondent. Clarke's testimony is to the opposite effect. It was not contradicted in any important detail.

III. The Court of Appeals Could Have Reached the Same Result on Other Grounds.

1. *New York Law:* In both of the courts below, the respondent argued that New York law should not be applied. There was no evidence of any impact on the petitioner in that state. By considering the New York law, the Court of Appeals rendered it unnecessary to deal with this question and another. These were noted by the court in a carefully detailed footnote to its opinion (A. 14-15, n. 13).

This same footnote also noted a corollary question which had been raised by the respondent. This was whether or not a Massachusetts plaintiff, suing in Massachusetts, could recover punitive damages for common law libel in the face of a Massachusetts statute specifically prohibiting such an award.

In short, the respondent had two other strings to its bow with which to attack the submission to the jury of the question of recovery under the New York statute or of punitive damages pursuant to the New York common law of libel. We submit that the Circuit Court would have adopted the argument of the respondent and thus, reached the same result that it did.

2. *Other Points:* In both the courts below, the respondent raised a number of legal arguments which were either dispositive of the case or entitled it to a new trial. It would constitute an onerous burden on this Court for respondent to reargue each of these questions at length in this brief. Instead, we have taken the liberty of attaching, as Appendix "A" hereto, a copy of the table of contents as it applies to the Argument in the respondent's brief filed with the Court of Appeals for the First Circuit.

IV. The Award of Costs Was Routine, Normal, and Within the Discretion of the Circuit Court of Appeals.

The petitioner makes the extraordinary assertion that he has been denied due process because of the award of the actual costs of the respondent in printing the record and brief for the Court of Appeals. The petition fails to mention the fact that the respondent filed a document defending the right of the court to award such costs. No point would be served in reproducing that paper and, thus, expanding this brief. It is sufficient to point out that most of the testimony and documentary evidence at the trial was developed and introduced by the petitioner. The material designated was necessary to enable the court to consider the numerous law questions which were properly raised by the appeal. The respondent prevailed in the Court of Appeals and, pursuant to its rules, it is entitled to its costs. To suggest that the assessment of these costs is an abuse of the discretion of that court is consistent only with some of the other arguments made by the petitioner in his desperate search for help from this court.

Conclusion

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Appendix "A"

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